IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 317 OF 1985

Jagannath Balkrishna Desai
heir and legal represetnative
of Balkrishna Vishnu Desai ... Appellant
(Heir of Orig. Plff)

V/s

Raghunath Babaji Desai
since deceased by his heirs and
legal representatives
1. Smt.Sunandabai Raghunasth Desai
2. Anant R. Desai
3. Smt.Premlata Laxman Salunkhe
4. Smt.Deepali Dattaram More
5. Arun Raghunath Desai
6. Anil Raghunath Desai
7. Smt.Jayashree Hemant Chavan
8. Smt.Rajani Balwant Satam ... Respondents
(Heirs of Orig. defts)

Mr.Prabhu i/b Mr.N.V.Walawalkar for Appellant
Mr.G.N.Salunkhe for Respondents

CORAM:S.R.SATHE,J.

DATED:10th Jan. 2007

ORAL JUDGMENT :-

1. The Appellant original plaintiff in Regular Civil Suit No.1 of 1975 has preferred this appeal against the judgment and order passed by the Court of the Assistant Judge, Ratnagiri whereby the order passed by the Court of the Civil Judge,J.D., Rajapur, decreeing plaintiff's suit for permanent injunction in his favour was set aside and the plaintiff's suit was dismissed with costs throughout.

2. For the sake of convenience hereafter the parties shall be referred to as the plaintiff and defendant.

. Brief facts giving rise to this appeal are as under

3. Balkrishna Vishnu Desai, original plaintiff filed suit for permanent injunction stating therein that suit property bearing Survey No.21 Hissa no.8 admeasuring 4 gunthas situated at village Haradkhale, Taluka Lanja, District Ratnagiri was initially recorded in **BOT KHOT** in the name of Kanu Bapu Lotankar in Khata NO.11. From the year 1920 it was in possession of plaintiff's father. He constructed Kembli house and was residing there. Subsequently the plaintiff constructed a cattle shed and also started paying rent of the said property.

According to the plaintiff his father had planted mango trees, jack fruits and other trees in the suit land and he used to take the yield of those trees. Plaintiff's brother was residing in the said house upto year 1962. Thus according to the plaintiff he became the owner of the said property by adverse possession.

4. After abolition of Khoti, record of rights were introduced and plaintiff's name was entered in 7 x 12 extract in column of Kabjedar. It is the plaintiff's case that the defendant had no concern with the suit land but he got his name entered on the record of rights for 9 Ps share and on that basis erected a hut on the said land. Not only that but according to the plaintiff in the year 1974 the defendant extended the said hut in plaintiff's land and also removed the stones of the plaintiff's wall without giving any heed to plaintiff's objections in that behalf. The defendant also unauthorizedly cut two mango trees and thus caused loss to the plaintiff. Hence plaintiff filed suit for permanent injunction and prayed that defendant be restrained from doing any act outside his 9 Ps share and causing obstruction to the plaintiff's property. Plaintiff also claimed damages of Rs.50/- from the defendant.

5. The defendant filed his written statement at Exh.19 and contended that the suit land is from Khata No.11 of

Babu Kanu Lotankar. It was Survey No.21 Phalni No.7 and in the partition of village amongst co-sharers of Khoti, it was allotted to the share of defendant's father Babaji Janardhan Desai in His Dhada No.93. Not only that on 6-11-1941 defendant's father was put in possession of the said land. It is the contention of the defendant that since then he is in possession of the said land. Plaintiff's father Janardhan was real brother of the defendant's father Babaji. The suit land was in possession of the father of the defendant even before partition. Plaintiff's father erected a cattle shed with permission of defendant's father and later on converted it in house and plaintiff was occupying the same with permission of the defendant. However, in the year 1957 plaintiff constructed another house and left the house situated in the suit land. The defendant contended that since then he is having his cattle shed in that portion. When record of rights were introduced taking advantage of the act that the defendant was not in the village plaintiff got his name entered to the suit land. Defendants made complaint about the same but it was of no use. The defendant further contended that trees standing in the suit land are planted by his father and not by plaintiff's father or plaintiff. He, therefore, submitted that the plaintiff is not entitled for injunction as prayed.

6. On these pleadings the learned trial Judge framed

issues at Exh.22. In order to prove the suit claim plaintiff examined himself and produced certain documents. The defendant also examined himself and produced several documents. After considering the evidence of both the parties the learned trial Judge came to the conclusion that the plaintiff has proved that he has become the owner of the suit property by adverse possession and was in possession of the same on the date of the suit. He also held that the defendant obstructed the plaintiff's possession and therefore decree the suit in plaintiff's favour.

7. Being aggrieved by the said judgment the original defendant filed Civil Appeal No.123 of 1978 in the Court of the Assistant Sessions Judge, Ratnagiri. After hearing both the learned advocates the learned Assistant Sessions Judge, Ratnagiri came to the conclusion that plaintiff has not at all proved that he is the owner of the suit property by adverse possession.On the contrary the defendant is the owner of the suit property. He therefore, allowed the appeal and dismissed the plaintiff's suit.

8. Being aggrieved by the said order the original plaintiff filed the present second appeal. From the perusal of the record it appears that while admitting the appeal on 5-9-1985 this Court (Coram: R.A.Jahagirdar,J) passed the following order:

"Admit on ground at Sr.Nos.3 and 4".

The said grounds are as under :-

> 3. The lower Appellate Court ignored material evidence on record which clearly showed that the plaintiff was having continuous and hostile possession of the suit land.
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> 4. The lower Appellate Court failed to appreciate that the Defendant knew the possession of the plaintiff to be adverse to his title when the entry had been made in the Record of Rights showing the plaintiff to be the owner of the said land, and that the defendant had made unsuccessful attempts to get the entry of the plaintiff’s name removed.

9. In this appeal before me the learned Advocate for the Appellant has urged only 2 points. Firstly, he submitted that the learned first appellate Court has not properly appreciated the evidence on record and has wrongly held that the plaintiff has failed to prove that he has become owner of the suit property by adverse possession. Secondly, he canvassed before me that the revenue record goes to show that the plaintiff is in fact in possession and even if it is held that

the defendant is co-sharer in the said property still there is no evidence to show that the plaintiff was ousted from the property and thereby the defendant acquired the title. He, therefore, submitted that the appeal be allowed and decree for permanent injunction be passed against the defendant.

10. As against this the learned Advocate for the Respondent supported the judgment and order passed by the learned first appellate Court. She also submitted that plaintiff has in fact failed to prove that he is having valid title to the suit property and as such no discretionary relief can be granted in plaintiff's favour.

11. From the perusal of the plaint, we find that the plaintiff has nowhere specifically stated that his father was the owner of the suit property or that he is the owner of the suit property. On the contrary he has alleged that the land in question was initially standing in the name of Kanu Bapu Lotankar but plaintiff's father constructed house in the same and started vahiwat of the same. In fact the plaintiff has stated in the plaint that he has also become the owner of the suit property by adverse possession. It is needless to say that the plaintiff cannot lay claim at one and the same time that he is the owner of the suit property since his father was owner and at the same

time contend that he has become owner by adverse possession. It is needless to say that the plaintiff must stand or fall on his own pleadings. The pleadings in the plaint clearly indicate that the case of the plaintiff is that he has become the owner by adverse possession. It is well settled that to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent for statutory period. In the instant case the plaintiff has not at all specifically pleaded as to when he became owner by adverse possession. The plaintiff has in fact stated that the land originally belonged to Babu Lotankar and thereafter his father constructed a house and then he came in possession of the suit land. He has also stated that his father constructed a house on the old plinth which was of Lotankar. It is pertinent to note that at the same time he has stated that at present he is not residing in that house thereby indicating that he is not in actual physical possession of the suit land. He has also stated that he used to pay rent of the said land to the defendant. When he says so, he indirectly admits that he is not the owner of the suit land. Not only that but it also shows that he is acknowledging the ownership of other person and without claiming any proprietary right or ownership right, on the contrary pays rent to the other persons, here to the defendant. When such is the position, how it can be said that the plaintiff has become the owner of the

suit property by virtue of adverse possession. The record in fact goes to show that on the date of the suit the plaintiff was in fact in actual possession of the land in question. He himself has even admitted that the defendant got his name entered in the record of rights to the extent of 9 Ps share and erected hut on that basis. But thereafter he made an encroachment and extended the said hut and occupied the suit land. So, this also indicates that the plaintiff was not in actual physical possession of the suit property on the date of the suit. If it is the case of the plaintiff that the defendant extended his hut and occupied other portion in the suit land then his proper remedy was to file a suit for possession and not a suit simplicitor for permanent injunction.

12. In order to substantiate his case the plaintiff has produced certain l;and revenue receipts. However, if we see the extract of form no.8 by Khata No.206 then we find that number of the suit land is not mentioned in the said Khata NO.206. So, the revenue receipts produced by the plaintiff are of no help to him to prove his case.

13. The defendant’s evidence on the contrary goes to show that land in question was allotted in partition between Khots to his father. His father had in fact purchased Khot Hissa when his father made a complaint

and asked for suit land as per his share it was given in his possession. So, under such circumstances we find that the defendant is in fact having title to the suit property. Merely because plaintiff has adduced some evidence to show that he has paid the assessment, we cannot jump to the conclusion that it was in his personal capacity. He might have paid the same for the defendant. If we peruse **Vatap Takta** Exh.61 produced by the defendant then also we find that the land in question was allotted to the share of the defendant's father. Thus, from the defendant's evidence it is clear that the land in question was not only given to the share of the defendant's father but the same was given in possession of the defendant's father. So, record in fact goes to show that the plaintiff is not the owner of the suit property.

14. Much is made about the fact that the defendant made efforts to get the plaintiff's name deleted but he was not successful in that process and plaintiff's name continued. However, it is pertinent to note that plaintiffs have produced the extract of mutation Entry NO.1026 at Exh.55 wherein it is clearly mentioned that name of the plaintiff in respect of the suit land be deleted from the record of rights. So, if thereafter the name of the plaintiff has continued, it is obviously incorrect and that would certainly not give rise to any presumption in favour of the plaintiff.

The learned Advocate for the plaintiff has placed reliance on a case **Darshan Singh and Ors V/s Gujjar Singh (Dead) By Lrs and Ors. (2002) 2 SCC 62** to show that merely because defendant is co-sharer and is in possession of some property that will not give any title to him unless there is evidence to show that defendant has ousted the plaintiff. It has to be noted that in the instant case the defendant is not claiming any title by virtue of adverse possession. So, the question of defendant ousting the plaintiff in fact does not arise and hence the said ruling is of no use to the plaintiff.

15. From the above discussion it is very clear that the learned first appellate Court rightly appreciated the evidence on record and correctly held that the plaintiff has failed to prove that he has become owner of the suit property by adverse possession and has also failed to prove possession referable to a valid title. When such is the position, he was justified in rejecting the claim for injunction because even the Apex court in **Premji Ratansey Shah and Ors V/s Union of India and Ors. reported in 1995(2) Bom. C.R. 374 SC** in similar circumstances has held that discretionary relief of injunct**ion** cannot be granted against true owners.

16. In view of the above, the order passed by the

learned Assistant Judge, Ratnagiri is legal and correct and there is no necessity to interfere with the same. Hence the appeal is dismissed with costs.

(S.R.SATHE,J.)